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President's Column

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President's Column

Kevin S. Burke

If every court achieved 99.9 percent quality for litigants, should we be satisfied? In other endeavors, if 99.9 percent was the standard of excellence, the IRS would lose two million documents this year, 3,056 copies of tomorrow's *Wall Street Journal* would be missing one of three sections, and 12 babies would be given to the wrong parents each day. For those industries, 99.9 percent is not good enough and it cannot be acceptable for courts either. Judicial excellence is a mindset. It must be an obsession or, as Aristotle said, "Quality is not an act. It is a habit."

Today being a judge is a 24/7 job. Judges are viewed as leaders in our community. We are, in a sense, role models in an era where it is very difficult to be a role model. The political rhetoric of our time has become so heated and polarized that trust and confidence in courts is jeopardized. The high-spending judicial races of some states are problematic but, lest anyone become complacent, even in Canada there are instances of political figures rather unfairly criticizing courts.

None of us should be so naïve as to expect agreement on the vision or justice we seek. Judges will and should have disagreements, but we must have those debates about our vision for justice in a manner that fosters public confidence. We need to unify around a common vision for judicial excellence.

Judicial excellence comes in part when we provide procedural fairness. One hundred percent of the time we must insist people in our courts are listened to, treated with respect, and understand our orders. Popular dissatisfaction with courts is fueled not just by rhetoric, but by performance. In a democratic society, judges have no control over political speech that is critical of courts or even downright wrong and malicious. But we can control our own performance.

The American Judges Association took a leadership role in the journey toward judicial excellence when we adopted the white paper on procedural fairness in 2007. Four years later a lot of judges (far more than our membership) have seen our work and/or participated in educational programs focused on procedural fairness. But more needs to be done.

To achieve judicial excellence, we need to commit to getting judges honest and reliable feedback. While a very strong case can be made that the performance measure of procedural fairness should be public, no justification can be made that no data on our performance be kept lest it somehow become public. CourTools Measure One for trial courts, developed by the National Center for State Courts, provides an easy template to gather the data on the court's accessibility and its treatment of customers in terms of fairness, equality and respect. (Go to http://www.ncsconline.org/D_Research/CourTools/index.html to look at it.)

Second, we need to learn from social scientists and others who study our work. My hope is that next fall the American

Judges Association can be presented with a second white paper that focuses on how to improve judicial decision making. AJA partnered with the National Center for State Courts in a grant application to the State Justice Institute to fund the necessary research for that paper, and SJI has funded the grant. If the American Judges Association motto, the Voice of the Judiciary®, is to be meaningful, we must speak with authority and wisdom in our quest for judicial excellence.

Tightening budgets cripple innovation and fear of failure inhibits risk-taking. But fear is among our greatest obstacles to judicial independence and excellence. In his book *The Assault on Reason*, Al Gore wrote:

Fear is the most powerful enemy of reason. Both fear and reason are essential to human survival, but the

relationship between them is unbalanced. Reason may sometimes dissipate fear, but fear frequently shuts down reason. As Edmund Burke wrote in England 20 years before the American Revolution, "No passion so effectually robs the mind of all its powers of acting and reasoning as fear." Our Founders had a healthy respect for the threat fear poses to reason. They knew that, under the right circumstance, fear can trigger the temptation to surrender freedom to a demagogue promising strength and security in return. They worried that when fear displaces reason, the result is often irrational hatred and division. As

Justice Louis D. Brandeis later wrote, "Men feared witches and burnt women."

Courts are dynamic institutions—at least they are capable of being dynamic—but if the times in which we live lead judges to fear that innovation and change are too risky, we will likely suffer, but more importantly the communities we serve will suffer. The judges who started drug courts, mental-health courts, domestic-violence initiatives, or family-court reform could not know at the outset that these initiatives would succeed. In each instance, there were plenty of skeptics. But those initiatives occurred and were eventually successful because the judges who started them were not paralyzed by a fear of failure.

Decades ago, Robert F. Kennedy said,

There is a Chinese curse which says, "May he live in interesting times." Like it or not, we live in interesting times. They are times of danger and uncertainty; but they are also the most creative of any time in the history of mankind. And everyone here will ultimately be judged—will ultimately judge himself—on the effort he has contributed to building a new world society and the extent to which his ideals and goals have shaped that effort.

We do live in interesting times. And in Robert Kennedy's words, my hope is for all of us that we will be judged and judge ourselves as committed men and women who sought to build a judiciary committed to excellence 100 percent of the time.

